No. 76-1621

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

VANIS RAY ROBBINS and
RUSSELL PATTERSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Vanis Ray Robbins and Russell Patterson pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit issued April 28, 1976, in a proceedings entitled: United States of American, Plaintiff-Appellee v. Vanis Ray Robbins, Defendant-Appellant, No. 75-2277, and United States of America, Plaintiff-Appellee v. Russell Patterson, Defendant-Appellant, No. 75-2278, and Rehearing refused June 9, 1976, Appeal from the United States District Court for the Southern District of Ohio, Western Division.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is printed as Appendix hereto. It has not yet been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered April 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

I-a

Did the District Court err in permitting indictment to be amended as the prosecutor saw fit so that dates of offenses were changed in nine instances and the time of conspiracy extended to accommodate government evidence, three years after the Grand Jury issued the indictment?

I-b

Did the District Court err in permitting the government to submit its own re-edited, retyped, redated prosecutor-tailored indictment at the close of the case after all evidence was in?

STATEMENT OF FACTS

The following facts are submitted as the basis for this joint appeal on behalf of Appellants Patterson and Robbins.

Both appellants were indicted, tried and convicted in a gambling conspiracy case. Patterson was charged in only one count of the original indictment, the conspiracy count, and Robbins in 5 counts. The original indictment had nine counts and 18 defendants but only 7 remained to face trial. Of these, three were dismissed by the court just before argument after they had sat before the jury during 10 days of trial. Only these two appellants and two other defendants went to the jury for final determination.

In the original nine count indictment (Count 8 was stricken by the court during trial) Appellant Patterson was charged in – and convicted under – one count only, Count One, the general conspiracy charge. The sections charged were Section 1252 and Section 1084, U.S.C. Section 1084 was later stricken by the court.

Appellant Robbins was charged and convicted on the same sections in Count I, and also in Count II, under Section 1952; Count IV, under Section 1952; Count VII, under Section 1084; Count IX, under Section 1084.

The facts under appeal are the following acts of the District Court that violated the constitutional rights of both Appellant Robbins and Appellant Patterson:

The Court permitted the government prosecutor:

(I) To amend the indictment three years later by making 5 date changes in 5 of 9 counts and by extending the one conspiracy count two weeks to satisfy prosecutor's evidence.

(II) To redraw, at the end of the case, another "indictment" for presentation to the jury, in which all other prior charges and defendants were omitted, new dates inserted, the conspiracy period extended, all to accomodate the prosecution.

DECISION IN COURT OF APPEALS

The Sixth Circuit Court of Appeals by order dated April 28, 1976, affirmed the judgment of the District Court on both questions raised herein, and dismissed a Petition for Rehearing on June 9, 1976.

The Decision stated that the dates contained in the indictment were not essential elements of the offense and that no prejudice has resulted to Appellants by their alteration.

This is precisely the point of attack in the appeal to this Court.

I — The changed dates were, by government admission, changed to fit the evidence and the evidence here was a wire-tap of betting conversation regarding a particular horse in a particular race on a particular day. This aspect affected the proof against Robbins, the alleged bookie, and prejudiced him to the extent of the prison term meted out to him.

II — The extended time of conspiracy affected Patterson since it applied only to Count I, the conspiracy count, and the conspiracy count was the only count in which Patterson was charged. This prejudiced Patterson in that it resulted in his conviction and prison sentence.

REASONS FOR GRANTING WRIT

Petitioners state that they both were deprived of their constitutional rights to a fair and impartial trial because of the refusal of the Court to acknowledge that only a Grand Jury can make major alterations in its own indictment.

Petitioners state that there exists a conflict between the decision of the Sixth Circuit Court of Appeals herein and the Third Circuit Court of Appeals in *United States* v. *Goldstein*, 502 F.2d 526 (CCA 3, 1974), which held that any amendment to an indictment without grand jury action must result in automatic reversal.

ARGUMENT

I-a

Did the District Court err in permitting indictment to be amended as the prosecutor saw fit so that dates of offenses were changed in nine instances and the time of conspiracy extended to accommodate government evidence, three years after the Grand Jury issued the indictment?

I-b

Did the District Court err in permitting the government to submit its own re-edited, retyped, redated prosecutor-tailored indictment at the close of the case after all evidence was in?

I-a

It is the contention of Appellants that the government had adequate time to determine the exact dates on which its wire taps took place and that the Court erred in per-

mitting the prosecutor to twice tamper with the original indictments to suit the purpose of the prosecutor.

The last overt act by any defendant in the original indictment was on March 27, 1970. The matter went to the Grand Jury in October, 1971 and the indictment was returned October 8, 1971, or 19 months after the last alleged overt act. It was to charges set forth in this indictment, the only one issued by the Grand Jury, that the Appellants, then Defendants, made answer on October 28, 1971.

Three years later, on October 31, 1974, at a pre-trial conference, the government made application for an order to amend the indictment in order to effect nine date changes including five out of nine counts and four out of 15 overt acts. [Trans.: Chambers Conference, October 31, 1974, p. 9, App. 32] The Court granted this motion to change the dates charged by the Grand Jury, extending the time for the conspiracy count, Count I, from March 19th to April 13, 1970. The Court did refuse the government's request to extend Count VIII from March 5th to November 25th, and did condition its permission to change the indictment with the words "if you are going to do it by separate entry."

Having secured a series of date changes to match the dates of its wire taps, the government explained why, in its own words: "Because the indictment as originally drafted alleged the conspiracy to end March 30th and the Search Warrants weren't executed until April 13th." [Trans.: Chamber Conference, Oct. 31, 1974, p. 11, l. 13, App. 32]

I-b

But the government did not stop there. At the end of trial, having riddled the Grand Jury's indictment with

key date changes and crucial time extensions, it then moved to scuttle it altogether. It proposed to recast the original indictment under the guise of retyping and "correcting" it so that it would be tailored, both by name, changed date and changed charge to fit the government's case against the seven who were to face the jury. [Trans.: Vol. 9, p. 1733, l. 11-14] Defendants' objections were noted but the Court, going beyond its earlier condition ("if you are going to do it by journal entry") permitted this re-edited "indictment" to be drawn and submitted. In fact, the Court gave the government a free hand to jerrymander its own indictment by handing the original indictment to the prosecutor with these words: "Yes, I will help you a little bit on that. Here are three copies of indictments (handing). Now, if you want to have somebody change them to what this jury is supposed to be thinking about, we will send the indictment, the original indictment to them and then we will send that on top of it and just tell them that as the result of the proceedings in this case the way this thing is now is the way it's on top. [Trans.: Vol. 9, p. 1734, l. 13-23, App. 36] Appellants objections were noted.

This Court's attention is directed to the instrument resulting from this. It is styled "Indictment," not an "abbreviation" nor an "Amendment" as this Court will note. This creation of the prosecutor (with court approval) is not the true bill issued by the Grand Jury though by its wording it pretends to be. It is indeed "the result of proceedings in this case," a classic example of the cart before the horse. One is tempted to suggest a variation on another classic. Here it is more than changing horses in the middle of the stream. Here it is shooting the first horse — and then using its dead body to float an imposter past the jury. Note the trial court's treatment on this

matter in its final charge [Trans.: Vol. 10, p. 1904, App. 37] ". . . since throughout the proceedings the original indictment has been the subject of legal procedures, there is attached right to the original indictment a paper called 'Indictment' which has been abbreviated so as to include only the matters pertinent to your consideration . . ."

In *United States* v. *Peter Pandilidis,* decided by the Sixth Circuit, October 24, 1975, the Court considered the danger of tampering with the Grand Jury's indictment. There a distinction was made between a non-felony case, such as *Pandilidis,* and a case like the present case where the issues *are* indeed of constitutional dimensions and where no information had been vouchsafe through a Bill of Particulars.

The Sixth Circuit in the *Pandilidis* case, supra, saw fit to distinguish between a non-felony case before it then and a felony case such as this. It did affirm the basic protection assured a Grand Jury's indictment against later tampering, either by Court or prosecutor.

> The filing of the bill of particulars effectuated an amendment to the indictment. Ordinarily, an indictment may be amended only by subsequent action of the grand jury. *Stirone* v. *United States,* 361 U.S. 212 (1960); *Ex parte Bain,* 121 U.S. 1 (1887). This rule, constitutional in origin, has developed within the context of the Fifth Amendment, which protects an accused from prosecution for high crimes except upon charges filed by a grand jury. In both *Stirone* and *Bain,* the Supreme Court concluded that effectuation of the Fifth Amendment protections required the preclusion of substantial variations in an indictment unless approved by a grand jury. "Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision at the mercy or control of the court or prosecuting attorney. . . ." *Ex parte Bain, supra* at

> 13. While a mere change in date is not normally considered a substantial variation in an indictment, where the date of the alleged offense affects the determination of whether a crime has been committed, the change is considered material. Since a crime is committed under 26 U.S.C. § 7203 only if the defendant fails to file a return on the date established by statute, regulation or administrative action, time is an essential element of the offense and any change in the date as charged is a substantial variation. *United States* v. *Goldstein,* 502 F.2d 526 (3rd Cir. 1974). Thus, the Fifth Amendment prohibits, other than by grand jury action, the changing of a date in a felony indictment where the date is an essential element of the offense. While this defendant was convicted of a misdemeanor that could have been prosecuted by information as well as by indictment, we agree with the defendant that even in misdemeanor cases, once the prosecution elects to proceed by indictment it must follow the rules developed to govern use of indictments. *United States* v. *Fischetti,* 450 F.2d 34 (5th Cir. 1971), *cert. denied,* 405 U.S. 1016; *United States* v. *Goldstein,* 502 F.2d 526 (3rd Cir. 1974); Fed.R.Crim.P. 7(e). Accordingly, it is apparent that the district court erred in permitting amendment to the indictment by filing a bill of particulars.
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> * * *

The Third Circuit recently resolved this issue against the government in *United States* v. *Goldstein, supra,* where it concluded that even in misdemeanor cases, in which indictments are not constitutionally required, any amendment to an indictment without grand jury action must result in automatic reversal. This conclusion was based on a finding of *per se* prejudice to a defendant prosecuted by an indictment that is subsequently amended. The court noted that prejudice to a defendant necessarily follows an amendment to an indictment because the government obtains distinct advantages from the indictment procedure;

it benefits from discovery through the use of the grand jury process and from the possibility that a jury verdict might be subtly influenced by the fact that an impartial grand jury found probable cause to charge the accused.[5]

* * *

The rules governing the content of indictments, variances and amendments are designed to protect three important rights: the right under the Sixth Amendment to fair notice of the criminal charge one will be required to meet, the right under the Fifth Amendment not to be placed twice in jeopardy for the same offense, and the right granted by the Fifth Amendment, and sometimes by statute,[6] not to be held to answer for certain crimes except upon a presentment or indictment returned by a grand jury. *Russell* v. *United States,* 369 U.S. 749 (1962); *United States* v. *DeCavalcanee,* 440 F.2d 1264 (3rd Cir. 1971); *United States* v. *Bryan,* 483 F.2d 88 (3rd Cir. 1973); *Gaither* v. *United States,* 413 F.2d 1061 (D.C. Cir. 1969). The rule preventing the amendment of an indictment should be applied in a way that will preserve these rights from invasion; where these rights are not threatened, rules governing indictments should not be applied in such a way as to defeat justice fairly administered.

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[5] We are troubled by the suggestion in *Goldstein* that a petit jury might consider a grand jury indictment as tending to prove a defendant's guilt. It is impermissible for a jury to infer guilt from the fact of an indictment or information. See Mathes & Devitt, *Federal Practice and Instructions* § 806.

[6] In *Russell* v. *United States,* 369 U.S. 749 (1962), prosecution by indictment was not constitutionally required for the offense as charged. However, a statutory provision required prosecution only by indictment and that Court adopted a *per se* rule of reversal to protect this statutory right.

It is at this point that this appeal lies. The Sixth Circuit has violated the basic rule set out by the Third Circuit in *United States* v. *Goldstein, supra,* by permitting a basic amendment to an indictment without Grand Jury action and must therefore result in automatic reversal.

(1) Dates *are* crucial and essential elements when racing results and race betting are secured by wiretap. They both *must* match date by date or they are worthless, and the government should not have been permitted to tailor the dates to suit its evidence three years later.

(2) Three years later a conspiracy charge cannot be extended two weeks for the same reason.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted to both Petitioners herein.

Respectfully submitted,

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APPENDIX

Proceedings in the
United States Court of Appeals
For the Sixth Circuit

CAUSE ARGUED AND SUBMITTED

April 12, 1976

Before: EDWARDS, CELEBREZZE, Circuit Judges, and GREEN*, Senior District Judge.

This case was argued by William J. Dammarell for the Defendants-Appellants and by Joseph S. Davies, Jr., and Steven R. Olah, Department of Justice, and is submitted to the Court.

JUDGMENT

(Filed April 28, 1976)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript and the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

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* The Honorable Ben C. Green, Senior District Judge for the Northern District of Ohio, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 75-2277, 75-2278

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VANIS RAY ROBBINS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RUSSELL PATTERSON,
Defendant-Appellant.

ORDER

(Filed April 28, 1976)

Before: EDWARDS, CELEBREZZE, Circuit Judges, and GREEN*, Senior District Judge.

Appellants apeal their jury convictions for conspiracy to conduct an illegal gambling enterprise with the use of a facility in interstate commerce (18 U.S.C. § 1952). Appellant Robbins additionally appeals his convictions of the

* The Honorable Ben C. Green, Senior District Judge, for the Northern District of Ohio, sitting by designation.

substantive offenses of violating 18 U.S.C. § 1952 and of transmitting wagering information by wire across state lines in violation of 18 U.S.C. § 1084.

Appellants contend that the District Court erred in permitting the Government to amend the dates set forth in the felony indictment and in permitting the submission of the amended indictment to the jury.

We conclude that the dates contained in the indictment were not essential elements of the offense and that no prejudice has resulted to Appellants by their alteration. We also conclude that the other issues raised by Appellant on appeal are wholly without merit.

It is therefore ORDERED that the conviction of Appellants be and hereby are affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By /s/ GRACE KELLER
Chief Deputy